IN THE

Supreme Court of the United States

October Term, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION,
Appellant,
v.
EL PASO NATURAL GAS COMPANY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

JOINT MOTION TO AFFIRM OR IN THE ALTERNATIVE TO DISMISS, AND BRIEF, OF APPELLEES, CASCADE NATURAL GAS CORPORATION, INTERMOUNTAIN GAS COMPANY, NORTHWEST NATURAL GAS COMPANY, THE WASHINGTON WATER POWER COMPANY, WASHINGTON NATURAL GAS COMPANY, IDAHO PUBLIC UTILITIES COMMISSION, PUBLIC UTILITY COMMISSIONER OF OREGON AND WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION.

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MOTION TO AFFIRM OR DISMISS

Cascade Natural Gas Corporation, Intermountain Gas Company, Northwest Natural Gas Company, The Washington Water Power Company, Washington Natural Gas Company, Idaho Public Utilities Commission, Public Utility Commissioner of Oregon and Washington Utilities and Transportation Commission, intervenors in the case below and appellees herein, hereby move, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, that the final judgment and decree of the

United States District Court for the District of Utah be affirmed, or in the alternative the appeal be dismissed on the grounds that appellant, the Utah Public Service Commission, has no standing to appeal, the questions presented are so unsubstantial as not to warrant further argument, and the noting of probable jurisdiction of this appeal would defeat the mandate of the Supreme Court that divestiture be accomplished without delay.

STATEMENT

The appellees named herein (hereinafter referred to as Northwest intervenors) adopt the Statement of Southern California Gas Company and Southern Counties Gas Company of California appearing at pages 2 and 3 of their Motion to Affirm.

The five companies joining herein are natural gas distributors serving natural gas at retail in Oregon, Washington and Idaho. The three state commissions joining herein are the regulatory agencies of Oregon, Washington and Idaho.

SUMMARY OF ARGUMENT

Appellant has shown no substantial, direct interest which has been or will be adversely affected or injured by the acquisition by Colorado Interstate Company (formerly Colorado Interstate Gas Corporation)[1] of El Paso's Northwest Division properties following their divestiture. Appellant therefore has no standing to appeal from the divestiture decree authorizing such acquisition. Appellant likewise has no standing to assert possible anti-trust effects of the acquisition which, if they exist, relate to the interests of other parties who were ade-

1. Colorado Interstate Corporation is hereinafter referred to as "CIG."

quately represented before the District Court and who have not appealed.

Acquisition of El Paso's divested properties by CIG will fully comply with the mandate and the guidelines respecting divestiture without delay hitherto ordered by this Court. Appellant's declared interest in maintenance of Northern Division Headquarters in Utah is neither relevant nor substantial enough to require a finding of probable jurisdiction. The evidence does not support appellant's contention that CIG's acquisition may substantially lessen competition in, or tend to create a monopoly as to, sales of natural gas in Utah, or elsewhere.

The public interest of natural gas consumers throughout the Far West has suffered and continues to be adversely affected by the uncertainties of protracted litigation over this divestiture. A compelling need exists for avoidance of further delays in concluding a divestiture that has consumed thirteen years during which an illegal acquisition has been preserved.

ARGUMENT

Appellant Has No Standing to Appeal as It Is Not Injured or Affected by the Decree of the District Court

Appellant is an agency of the state of Utah having regulatory jurisdiction limited to intra-state service by utilities and transportation companies. It has no regulatory jurisdiction over natural gas pipeline companies subject to the jurisdiction of the Federal Power Commission, nor does it have any statutory power to enforce the anti-trust laws enacted by Congress.

In *Cascade Natural Gas Corporation v. El Paso Natural Natural Gas Co.*, 386 U.S. 129 (1967), this Court held

that the intervention of interested parties should be allowed on the grounds that the then existing parties could not represent their varied interests in the divestiture of El Paso's Northwest Division. The District Court allowed the intervention of twenty-two parties.

The District Court, on June 9, 1967, at a pre-hearing conference (Tr. 117),[2] directed all intervenors to file comments regarding all applicants for acquisition of El Paso's Northwest Division and indicating the intervenors' approval of or their opposition to the various applicants, the various plans and their reasons therefor. Appellant's comments as filed, however, did not reflect any opposition to CIG or to its plan, nor did its comments reflect opposition to any applicant on anti-trust grounds.

Appellant did not at any time during the trial raise any issue concerning anti-trust implications of any applicant.

In its initial brief, filed April 19, 1968, appellant clearly disclosed its limited self-interest, to-wit:

> "The state of Utah has a special, albeit, narrow interest in this proceeding in one respect which is where the new company will be headquartered. It is recognized that this question is not of substantial interest to the parties or other intervenors, nor is it an important aspect of the decisions from the Supreme Court which are controlling in this proceeding. However, Utah is desirous that the headquarters of the new company be re-installed in the Pacific Northwest Building now known as the El Paso Natural Gas Building in Salt Lake City, Utah."

Thus, appellant's only demonstrated interest during the entire trial, which consumed in excess of fifty-seven

2. Transcript references are to the Transcript in the District Court.

days was the matter of where the headquarters of the new company might be located.

Appellant did not even appear at the oral argument on June 3, 1968 before the District Court (Tr. 9885). The District Court rendered its findings, conclusions of law, and opinion dated June 21, 1968.

Appellant's objection to CIG as an applicant for acquisition was presented in open court on August 23, 1968, at which time appellant was advised by the court as follows:

> "MR. BERMAN: Your Honor, I would desire 30 minutes if that would be possible for the court. Let me say, I understand the court has indicated that they only wanted supplementary argument. I think we have tried to adequately set forth our position in the brief, but I would like to have the opportunity to argue it, if the court would give me . . .
>
> "THE COURT: I can't allow you that much time, Mr. Berman. We have got too much ground to cover in one day.
>
> "And may I point out, of course, for the record, what you already know, that this is a matter that is brought before the court by Utah for the first time at this time. And for the record, I point out that in the brief filed April 19, 1968, which is the time that Utah should have raised this question, the state of Utah says in part: 'The state of Utah has a special, albeit narrow, interest in this proceeding in one respect, which is where the new company will be headquartered.'
>
> "That's the only objection or ground—or not objection, but the only ground upon which Utah submitted its case. They produced no evidence of CIG's operations. They filed no brief attacking CIG's qualifications.
>
> "Now, for that reason, I think that this should be a part made clear in the record.

"Secondly, the court considered the anti-trust implications of Colorado Interstate very thoroughly before entering its Findings of Fact and Conclusions of Law. The court has also read Utah's brief, is well advised of the contentions of Utah, and even though they did not raise the issue at the previous time, the court will not use that as a means to prevent consideration of the objections of the Utah Public Service Commission.

"Now, with that statement, Mr Berman, you may have 15 minutes." (Tr. 9976-9977)

Thus, a pertinent question is why appellant now raises an anti-trust issue as to the selection of CIG when appellant did not in its comments filed with the court nor at any time during the trial show the slightest concern about anti-trust considerations involving CIG, Wyoming gas reserves, additional pipeline service to California and the Pacific Northwest, or sales of gas in Utah.

The Northwest intervenors submit that the right to intervene accorded the state of California by *Cascade Natural Gas Corporation v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), did not grant appellant herein a right or standing to appeal on grounds which have no substantive connection with its stated interest in the case below, to-wit; the location of the New Company's headquarters. Thus, this appeal lacks the substantiality required by this Court's Rule 15 (1)(f).

Furthermore, appellant's jurisdictional statement[3] in no way discloses that appellant is injured, adversely affected, or has any "personal stake" in the result. The Supreme Court's decisions make it clear appellant, under

3. References to pages of Appellant's Jurisdictional Statement are herein designated by the prefix "J.St."

the circumstances, has no "standing" to appeal. *Frothingham v. Mellon*, 262 U.S. 447 (1923); *Lehon v. City of Atlanta*, 242 U.S. 53 (1916); *City of Chicago v. Chicago Rapid Transit Co.*, 284 U.S. 577 (1931); *McCandless v. Pratt*, 211 U.S. 437 (1908); *County Court of Braxton County v. West Virginia ex rel. Dillon*, 208 U.S. 192 (1908); *Flast v. Cohen*, 392 U.S. 83 (1968).

In *Frothingham, supra,* a private citizen alleged that as a taxpayer she had standing to raise constitutional questions with regard to a Federal Maternity Act. The court made the following comment concerning "standing to appeal":

> "The party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining *some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with other people generally.*" 262 U.S. at 488. (Emphasis supplied.)

Chicago Rapid Transit, supra, is a case closely analogous to the instant one. There the Supreme Court held the City of Chicago, which had been permitted by the District Court to intervene as a defendant in a suit brought to restrain the Illinois Commerce Commision, and the attorney general of the state had no separate standing to appeal from a decree enjoining the enforcement of a rate order. The appellant's position is considerably weaker than that of the City of Chicago.

The most recent decision to elaborate upon the requirements of standing is *Flast v. Cohen*, 392 U.S. 83 (1968). In *Flast*, the plaintiffs, who were federal income taxpayers, brought suit in District Court alleging that the

establishment-of-religion clause of the First Amendment was violated by the expenditure of federal funds to finance construction in religious schools. The District Court dismissed the complaint, holding that the plaintiffs' status as federal taxpayers did not give them standing to sue. On appeal, while the Supreme Court reversed the District Court, this Court made the following comment which is compelling in the instant case:

> "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The *'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr*, 369 U.S. 186, 204 (1962). *In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.*" 392 U.S. at 99, 100. (Emphasis supplied.)

Appellant has not pointed to any facts in the record showing that it, or the people of Utah, whose interest it purports to serve, has been adversely affected by the judgment below. There is only the bare allegation of a threat of lessened competition in Utah (J.St. 30-31). The other alleged anti-trust violations relate to the states of California, Wyoming, Colorado, Idaho, Oregon and Washington, whose interests were fully represented by the Department of Justice, the state regulatory bodies and private intervenors, none of which has appealed. In effect, appellant is assuming to prosecute a "class

action" by this appeal although all members of the class have been fully represented to their own satisfaction.

Further, insofar as Utah is concerned, the record does not sustain appellant's contention of concern regarding its alleged anti-trust fears within the state of Utah and certainly does not raise a question so substantial that it requires plenary consideration by this Court. The key word in Rule 15(1)(f) of the Revised Rules of the Supreme Court of the United States establishing this test, is "substantial." Likewise, the key word "substantially" is found in the test of the effect of an acquisition set forth in Section 7 of the Clayton Act (38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. §18 (1958)), the only statute involved in this appeal. The Northwest intervenors submit that the tests of substantiality depend upon the relative importance of the anti-competitive factor in acquisition in comparison with other important considerations.

A careful segregation of the actual facts in the record from the strained inferences and unfounded legal contentions which appellant has skillfully interwoven into that portion of its Jurisdictional Statement entitled "The Facts," reveals no more than the "ephemeral possibilities" of lessened competition or tendency toward monopoly which this Court and others have repeatedly stated to be inadequate to sustain a contention similar to appellant's. (See discussion below, page 13 *et seq.*)

Wholly apart from the question of appellant's standing to appeal, there is, as hereinafter shown, insufficient substance in appellant's contentions to sustain a finding of probable jurisdiction.

Acquisition by CIG of the Divested Properties Will Fulfill the Mandate of the Supreme Court

The mandates of this Court in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), and *Cascade Natural Gas Corporation v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), directed that the District Court order divestiture to a company independent of El Paso which would be strong enough to compete in the California market and at the same time serve the needs in El Paso's Northwest Division. In effect, the appellant contends that the District Court performed its task too well in selecting CIG as the successful applicant. The validity of appellant's contention must be tested in the light of applicable decisions of this Court interpreting Section 7 of the Clayton Act in conjunction with the specific directives of this Court's mandate, which constituted the law of the case, by which the District Court was controlled.

The history leading to the judgment from which this appeal is taken and the purpose of the divestiture plan to be established by that judgment are well known to the members of this Court. The merger of Pacific Northwest Pipeline Corporation into El Paso Natural Gas Company was determined to be illegal by eliminating Pacific Northwest from probable competition in the California market. Restoration of such probable competition in that market was "at the heart" of the Supreme Court's mandate for divestiture. In the period from 1957 to the present, suppliers of out-of-state gas to the California market have increased from one (El Paso) to three operating pipelines, each of which has combined resources in excess of those of the proposed combination of CIG and El Paso's

Northwest Division. Appellant recognizes that New Company, after divestiture, will not have a sufficient gas supply to enable it to immediately compete in the California market (J.St. 10). The purpose of the divestiture is to create an entity which can become an effective competitor in the California market and adequately serve the needs of the Northwest Division, all within the shortest practicable time.

The court below gave full consideration to this historical background and the purpose to be accomplished under the mandate of this Court. The following is quoted from the District Court's opinion set forth in the Appendix to appellant's Jurisdictional Statement:

> "The court finds, as do most of the intervenors, that all of the applicants are not equally qualified to make New Company a competitive factor in the California market. The court also finds that of those applicants who are so qualified, all do not have the capability of furnishing the same degree of competition. The court conceives its duty to be to select not only an applicant qualified to make New Company a competitive factor, but the applicant which in the court's opinion can and will furnish through New Company, the greatest degree of competition and the greatest impact on the California market.
>
> "To select less than the strongest and best qualified applicant, gives to El Paso an unwarranted advantage in the competitive race for the California market, and particularly so when in the court's opinion, New Company will be confronted with a much more formidable task in becoming such a competitive factor than was PNW for reasons which follow." (J.St. 93, 94)

The court found that CIG was superior in the following respects: a long history of successful pipeline operation, the advantage of physical interconnection of its system

with that of the Northwest Division; availability of experienced management and personnel which would restore competition in a shorter period; regulatory experience; ample financial capability to finance an invasion of the California market; a demonstrated ability to acquire needed reserves for its own system as well as California and Northwest markets and a greater incentive to expand to California because of its acquisition of all of the common stock of the New Company (J.St. 96, 97).

In *Cascade Natural Gas Corporation v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), this Court said at page 135:

> "In the present case protection of California interests in a competitive system was at the heart of our mandate directing divestiture."

Considering the history of the case and the purpose of the mandate of this Court, should the District Court have refused to select CIG and ordered divestiture to some other applicant, inferior in the above respects and incapable of restoring effective competition to California in as short a time?

If an applicant weaker than CIG had been selected, would the California interests have been protected in an adequately competitive system? Would the people of the State of California or Southern California Edison Company who were successful appellants in *Cascade, supra*, have been satisfied? Would Cascade Natural Gas Corporation and the other Northwest intervenors be satisfied with such a weaker applicant?

In selecting CIG to be the successful applicant, the District Court fulfilled the mandate of this Court.

Acquisition by CIG of the Divested Properties Will Not Lessen Competition or Tend to Create a Monopoly

The appellant contends that the acquisition of El Paso's Northwest Division properties by CIG, through its wholly owned subsidiary, Northwest Pipeline Corporation, creates a violation of Section 7 of the Clayton Act (1) by substantial lessening of competition in (a) the California natural gas market, (b) the market for gas reserves in Wyoming and/or (c) the natural gas market in Utah and western Colorado; or (2) by enhancing the alleged monopoly power of CIG (a) in the market area from eastern Colorado to the Pacific Northwest and/or (b) in the natural gas industry in general (J.St. 4, 5).

The foundation of appellant's contention is that, if CIG did not acquire the assets to be divested, there would be two additional competitors instead of only one in California and one additional competitor in each of the other market areas. It is contended that the New Company, controlled by another applicant, would afford competition for natural gas sales in California, the northwestern states and in Utah and western Colorado and also competition for gas reserves in Wyoming. It is also contended that, even without the acquisition of the divested assets, CIG would constitute a competitive factor, either by actually selling or buying in those markets or standing at the edges of them prepared to engage in competition.

Appellant's postition could be sustained only if it were found that if a New Company not controlled by CIG entered or threatened to enter one of those markets, CIG, by itself, would also enter or be capable and motivated to

do so. If either capability or motivation would be absent, competition would not be lessened by CIG's acquisition of the Northwest Division. *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

This brings us to the test of "probability" of an anti-competitive effect of the proposed acquisition, either in the lessening of competition or the tendency toward monopoly.

Brown Shoe Co. v. United States, 370 U.S. 294 (1962), involved both aspects of Section 7, a lessening of competition and the tendency to monopoly. This Court expressed the congressional intent as follows:

> "Eighth, Congress used the words '*may* be substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act." 370 U.S. at 323.

Under this test, probability of an anti-competitive effect is sufficient but the mere *possibility* is not. In the present case, unless the record discloses that there is a *probability* that CIG, without the Northwest Division assets, would constitute a significant competitive factor in one or more of these market areas, the acquisition cannot be condemned as substantially lessening competition.

A vital element of ability to compete is the likelihood that a would-be competitor could meet the requirements of Section 7 of the Natural Gas Act, (15 U.S.C. §717f (1958)), to obtain a certificate of convenience and necessity. These requirements include an unserved market, adequate reserves to serve such market and financial ability

to provide the required facilities, all at a price which would make service to the market economically feasible.

At page 23 of its Jurisdictional Statement appellant makes these statements without reference to any supporting evidence in the transcript:

> "Clearly, on the undisputed and objective facts, CIG is a potential competitor of the California market * * * CIG has immediate access to the vast reserves of the Wyoming basins, part of which it relinquished on the failure of the Rock Springs project and it can, with comparative ease, reach reserves in other areas of the Rocky Mountain region."

Appellant makes no attempt to show any probability that CIG, alone, could secure a Federal Power Commission certificate to serve California. The record shows that there are no "vast" proven Wyoming reserves not already committed (Tr. 3006, 3094-5, 9434)[4] and that CIG cannot reach reserves "in other areas of the Rocky Mountain region" unless it acquires the Northwest Division line which traverses these other areas (Tr. 2876-8; 3006-8). Appellant's assumptions are further controverted by undisputed evidence referred to below.

Peter J. King, Jr., a senior vice president of CIG, and Thomas L. Pelican, also a senior vice president of that corporation and president of its pipeline division, both testified, without contradiction, regarding the past, present and future capabilities of CIG to compete in California and other markets.

CIG has never attempted to compete in the area served

4. Dr. Haum testified that in the Green River Basin only 7.9% of the area had been drilled to the extent of one or more wells per square mile and only 5.794 trillion cu. ft. of gas had been discovered by 1968 (Tr. 9434).

by the Northwest Division including western Colorado, Utah or the territory beyond to the Pacific Coast (CIG Ex. 4, Tr. 2642, 2647-2648, 2650, 3096) nor, by itself, in California.

Geographic barriers and lack of significant market growth in the areas of Utah and western Colorado now served by the Northwest Division preclude any probability that CIG and New Company would be competitive there (Tr. 2650, 2659, 2661, 2983).

CIG made one unsuccessful effort to enter the California market in 1958 by participation in the Rock Springs project. This was motivated by a then existing burdensome excess gas supply which does not exist today. (Tr. 2554-2556, 2964-2965, 2971). Certificates of convenience and necessity for this project were ultimately denied by the Federal Power Commission in 1963 (Tr. 2555-2556). Since then CIG has been unable to make any further attempt to enter the California market. Subsequently, however, two new pipeline companies of major size, Transwestern and Pacific Gas Transmission, have been certificated to serve and are serving California (Tr. 2598-2599).

Although CIG's financial condition has improved materially (Tr. 2550, 2552) it still is unable to undertake a pipeline project to California alone because it does not have the gas reserves nor access to gas supply areas to support a California project without the Northwest Division (Tr. 3006-3008). We quote from cross-examination of Mr. King by counsel for Southern California Edison Company:

"Q. Now, I don't want to get into anything extended

on this, but you have stated your opinion that CIG could not compete for the California market now, and I just want to be certain that I understand. When you say 'now,' you mean now that you don't have the gas or what-not to go to California tomorrow, but — or do you mean absent the acquisition of New Company in your opinion, you would be unable to go into a program looking toward an expansion to California over the next few years?

"A. Absent the acquistion of New Company in my mind, we would be unable to undertake such a program.

"Q. Could you give me briefly the basis for your reasoning on that?

"A. Certainly today we don't have the gas supply, and absent the acquisition of New Company, we don't have available to us the wide range of gas supply areas that a combination provides, and in my opinion, if New Company is going to be the vehicle of competition to California, it is going to have to look to this whole range of supply sources to assemble the gas to make the project feasible." (Tr. 2876-2878)

The principal markets of the Northwest Division are at the western end of the line (CIG Ex. 4; Tr. 2642, 2648) and, although there is a growing demand for natural gas in that area the foreseeable increments are not substantial enough to warrant construction of a pipeline to that area from CIG's present system (Tr. 3110-3111). This is recognized by appellant in its Jurisdictional Statement:

"Appellant concedes that the record does not disclose whether a new project to serve the incremental demand of the Pacific Northwest with Wyoming-Rocky Mountain gas is feasible now or in the immediate future." (J.St. 31)

CIG does not have a sufficient gas supply to serve in

that market (Tr. 3096) and supplies of natural gas for that area are more readily available from Westcoast Transmission Company, Ltd., a Canadian pipeline company whose line terminates at Sumas, Washington,[5] Pacific Gas Transmission Company which presently has a line traversing Washington and Oregon, and Alberta Natural Gas Company with a line terminating at the Canadian-Idaho border (El Paso Ex. 1, Tr. 63). There is nothing in the record to indicate a probability of competition from any other source which would be eliminated by CIG's acquisition of El Paso's properties. Therefore, there could be no lessening of competition.

No party participating in the trial foresaw even a possibility that the Northwest Division would seek to compete in CIG's market east of the Continental Divide and appellant makes no such contention.

Finally, appellant's contention that the CIG acquisition lessens competition for Wyoming reserves is unsupported by the record and is not an issue within the mandate of the *Cascade Natural Gas Corporation v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967). First, this argument assumes the existence of known uncommitted reserves. The evidence shows there has not been enough drilling in this area to determine the extent of the Wyoming reserves or the feasibility of their recovery (Tr. 3006, 3094-3095, 9434). Second, this argument completely ignores the point that the heart of this case involves competition to California consumers, not competition for unknown reserves of Wyoming gas fields, which

5. Westcoast was a competitor for the FPC certificate to serve the Northwest area which was awarded to Pacific Northwest Pipeline Corporation. (Tr. 2553)

was not even considered in *Cascade, supra,* or in earlier decisions of this Court relating to this divestiture.

Appellant contends that the proposed acquisition by CIG will create further concentration of monopoly power. There has not been a concentration of competitors in either the California natural gas market or that of the Northwest or Utah-Colorado through elimination of prior competitiors as was the case in *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963); *United States v. Von's Grocery Co.,* 384 U.S. 270 (1966), and *United States v. Pabst Brewing Co.,* 384 U.S. 546 (1966), and other cases relied upon by appellant. In fact, when the Government commenced this action against El Paso, it was the only important interstate pipeline west of the Rocky Mountains. *United States v. El Paso Natural Gas Co.,* 376 U.S. 651, 658-659, 661 (1964). At the present time there are three, each of which is far more powerful than CIG and the Northwest Division would be after divestiture (CIG Ex. 2, Tr. 2598-2599). It is absurd to contend that creation of such a fourth competitor in that market in accordance with the mandate of the Supreme Court will tend toward a monopoly. The virtual monopoly enjoyed by El Paso respecting service to the Pacific Northwest cannot be furthered or increased by the substitution of a smaller, less powerful CIG and hence there can be no furtherance of monopoly power therefrom.

On the issue of alleged concentration of power in the natural gas industry, CIG's Exhibit 2 is important. It is there shown that, in gross utility plant, CIG ranks 28th, slightly over 1/10th the size of the largest company. The Northwest Division ranks 17th and, in combination, the

two systems would be 10th in the nation and less than ⅓rd the size of the largest company. In gas sales volumes, CIG is 19th and the Northwest Division is 23rd. Together they would be 11th, with less than ½ the sales volume of the largest company. Gross revenues of CIG put it in 27th place and gross revenues of the Northwest Division were 20th. Gross revenues of the combined systems would be 14th in the entire industry and would amount to less than ½ those of the largest company (CIG Ex. 2, pp. 1-3; Tr. 2595-2599).

Appellant's Argument on the Countervailing Power Doctrine Is Without Merit

In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), this Court examined the intent of Congress in adopting the 1950 amendments to Section 7 of the Clayton Act. The following relates to "countervailing power":

> "Fifth, at the same time that it sought to create an effective tool for preventing all mergers having demonstrable anticompetitive effects, Congress recognized the stimulation to competition that might flow from particular mergers. When concern as to the Act's breadth was expressed, supporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market. . . . Taken as a whole, the legislative history illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." 370 U.S. at 319, 320.

"The importance which Congress attached to eco-

> nomic purpose is further demonstrated by the Senate and House Reports on HR 2734, which evince an intention to preserve the 'failing company' doctrine of *International Shoe Co. v. Federal Trade Com.*, 280 U.S. 291, 74 L.Ed. 431, 50 S. Ct. 89. Similarly, Congress foresaw that the merger of two large companies or a large and small company might violate the Clayton Act while the merger of two small companies might not, *although the share of the market foreclosed be identical, if the purpose of the small companies is to enable them in combination to compete with larger corporations dominating the market.*" 370 U.S. at 331. (Emphasis added.)

The above quotations demonstrate that if competition will be enhanced or not substantially lessened the combination will not be prohibited even though one or more competitors might suffer. The "countervailing power" doctrine which appellant condemns (J.St. 20 *et seq.*) was recognized by Congress and by the Supreme Court in *Brown Shoe Co., supra.*

Since there is no probability of a substantial lessening of competition or tendency to create a monopoly from CIG's acquisition, resort to the countervailing power doctrine is not required to support the judgment. However, if the doctrine is applicable to this case, the District Court correctly applied it as shown by the quotations from the *Brown Shoe Co.* decision above. Although no contention is made that a New Company controlled by another applicant would be "failing," such a New Company could not re-establish effective competition in the California market to the economic extent and with the speed required by *Cascade, supra.* Therefore, the intention of Congress and the mandate of this court would be ac-

complished most effectively by the acquisition by CIG of the Northwest Division.

Appellant cites *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), and *United States v. Continental Can Co.*, 378 U.S. 441 (1964), as authority for the statement that the Supreme Court has consistently rejected the countervailing power defense to a Section 7 violation (J.St. 20-22). In each of those cases, the facts amply demonstrated that each of the combining parties had such a substantial position in the relevant market that it did not need the added strength of a combination to compete more effectively. In *Penn-Olin*, *supra*, although neither of the joint venturers had built a plant to supply the relevant market prior to formation of the joint venture, each of them had full capability of doing so and competing effectively without the combination. Therefore, none of these cases is relevant here.

The Findings of No Substantial Anti-Competitive Effect Are Sustained by the Record

The findings of the District Court that CIG should not be disqualified for anti-competitive reasons appear in the Appendix to Appellant's Jurisdictional Statement at pages 98-102.

The court's findings are supported not only by the uncontradicted testimony of Messrs. King and Pelican,[6] but by the record as a whole which demonstrates the enormity of the task of CIG, or any other entity, alone obtaining the substantial additional gas supply and financing which would be required merely to apply to the

6. See pages 17-20, *infra*.

Federal Power Commission for a certificate to construct a new pipeline to California.[7] These burdens, and the substantial risks involved, support the testimony of CIG's witnesses that CIG alone could not attempt to enter the California market or the market areas of the Northwest Division. Therefore, the District Court was not compelled to rely solely upon the alleged subjective statements of CIG's senior officers. The underlying facts upon which their opinions and intentions were based fully sustain them. Appellant's contention that CIG, alone, was ever, or may now be, a potential competitor in the California market is palpably erroneous and not supported by the record.

The District Court was correct in construing the mandate of this Court to require that the strongest possible applicant should be selected to provide effective competition in the California market and the court's findings that the acquisition by CIG of El Paso's Northwest Division will not substantially lessen or eliminate competition in any of the relevant markets should be sustained. On the record, there is no probability of either a lessening of competition or a tendency toward monopoly and the test of a Section 7 violation laid down in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), has not been met.

This Litigation Must Be Terminated

Appellant has chronicled on page 6 of its Jurisdictional Statement the problem of legal amputation of a major

7. A minimum of three trillion cubic feet of reserves would be required and the estimated capital requirements for a minimum pipeline project from San Juan to California was stated to be $93,000,000 (Tr. 2664-2665). Tennessee Gas Transmission Company expended over $9,000,000 in an unsuccessful effort to obtain Federal Power Commission approval for a line to Southern California (Tr. 2601, 2796).

segment of El Paso's natural gas transmission system, which has existed for nearly fifteen years as the sole supplier of natural gas to the Pacific Northwest region, and the placement of that segment of El Paso's system in sufficiently strong hands to pose a practical threat of competition in California which has been the subject of continuous litigation for nearly thirteen years. Appellant's current effort stands as the *fourth* time that this case has been brought before the Supreme Court of the United States. The three prior cases are:

California v. Federal Power Commission, 369 U.S. 482 (1962);

United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964);

Cascade Natural Gas Corporation v. El Paso Natural Gas Co., 386 U.S. 129 (1967).

The time has come to end this proceeding so harmful to the distributing companies and consumers in the Pacific Northwest who are the innocent victims of this litigation. These companies and their customers are solely dependent upon the owner of the pipeline serving the Pacific Northwest for their supply of gas. They need and are entitled to have their gas supplier finally determined and the cloud of nearly thirteen years of litigation removed.

The heart of the natural gas business is a pipeline supplier sufficiently qualified and motivated to assure the distributing companies and their customers of an adequate gas supply.

The record before the District Court clearly portrays the expansion in the demand for natural gas in the Pacific Northwest area during this period of litigation, and es-

tablishes the critical nature of the supply situation as it existed up to the end of the hearings in March of 1968 (Tr. 8883-8887, 8904-8905). This growth in demand for natural gas was correctly projected to continue.

In the face of a compelling and continuous need for substantial expansion of gas reserves available to the Pacific Northwest area and the expenditure of millions of dollars for additional facilities to make such gas available locally, El Paso's capabilities have been restricted year after year by the continuing threat and pendency of its obligation to divest itself of the entire network of transmission lines and related facilities supplying the Pacific Northwest. It was in recognition of the serious interests of such intervenors as Cascade Natural Gas Corporation, as well as the customers of El Paso in California, that this court, in *Cascade, supra,* established the right of such intervenors to participate in the formulation of a proper divestiture plan and order, without delay.

If probable jurisdiction be noted, extensive further delays will result before a final decision is rendered which could include another remand to the District Court. Such a result would create grave practical and legal problems. Are we to go through another two years or more of divestiture proceedings before this Court, the District Court, and the Federal Power Commision, thus continuing El Paso's illegal acquisition? What assurance is there that any of the other eight applicants for acquisition before the District Court are still in existence, let alone still interested? What assurance is there that another applicant could meet the test of *Cascade, supra,* and also satisfy appellant's position that the applicant selected by the court shall locate its

headquarters in Salt Lake City? What assurance is there that another applicant would satisfy the California intervenors or those from the Pacific Northwest? Finally, what assurance is there that a different applicant could survive still another appeal to this Court by a dissatisfied intervenor? We respectfully suggest the above be considered while this Court is reviewing the matter of probable jurisdiction.

Twenty-four direct parties to the litigation have been given full opportunity to present such affirmative case as they care to, in opposition to the selection of CIG. Only one of them, as we have heretofore pointed out, has seen fit to express its dissatisfaction with the selection. All, with the one exception, are now in accord with the District Court's decision: the consumers to the North, the consumers to the South, the state regulatory commissions and the federal government.

Manifestly, the degrees of satisfaction with the District Court's decision will differ, and it will always be so as to any decision which seeks to satisfy such a multitude of diverse interests. These individual interests cannot be indulged indefinitely. We are dealing here with a dynamic demand for a commodity supplied by an industry regulated in the public interest—a demand that is voracious. The predominant, the imperative, the over-riding, the really *substantial* requirement of the moment is the finalizing of the divestiture at the earliest possible moment so that the immediate and future needs of the Pacific Northwest which has suffered through years of indecision resulting from this litigation, and the burgeoning new demands of the California market for more gas, can be met. That over-riding requirement extends geographically

throughout the entire West from the Canadian to the Mexican borders, and it must be given priority consideration.

CONCLUSION

We respectfully submit that divestiture has been accomplished by the District Court in meticulous compliance with the mandate of this Court in *Cascade*. We urge the Court that it affirm the judgment or dismiss the appeal so that there can now be final divestiture without further delay.

Respectfully submitted,

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